SUPREME COURT, U. S.

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No. 163

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

WILLIAM A. AGORANOS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENT TO PETITION

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SUPPLEMENT TO PETITION

The petitioner wishes to supplement his petition filed in this cause and dated May 16, 1969 by the inclusion of the following additional reason for granting the writ. Namely, that the decision of the United States Court of Appeals in the instant case is in direct conflict with the decisions of the United States Court of Appeals for the Seventh Circuit in *United States* v. *Dickerson*, —— F.2d —— (7th Cir. 1969) (Case No. 17349, 7/28/69); and *United States* v. *Habig*, —— F.2d —— (7th Cir. 1969) (Case No. 17409, 7/28/69). Copies of those opinions are in the Appendix hereto at pages 3-11.

The conflict between the decisions of the United States Court of Appeals for the Seventh Circuit in *Dickerson*

and in *Habig*, and the decision of the United States Court of Appeals for the Fifth Circuit in the instant case, is that the court in *Dickerson* and *Habig* held that *Miranda*[1] warnings must be given to the taxpayer by the Internal Revenue Service in questioning a taxpayer after an investigation has become criminal, although the interrogation is non-custodial. Whereas, the Court of Appeals in the instant case held that the petitioner was not in custody and that the *Miranda* doctrine applied only to custodial interrogation.

Respectfully submitted.

ELI H. SUBIN
Of: ROTH, SEGAL & LEVINE
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August 27, 1969

CERTIFICATE OF SERVICE

I Hereby Certify that the required copies have been furnished to the Solicitor General, Department of Justice, Washington, D. C. 20530, by United States Mail, this 19th day of August, 1969, pursuant to the provisions of Rule 33, Rules of the Supreme Court of the United States.

ELI H. SUBIN
Attorney

[1] *Miranda* v. *Arizona*, 384 U.S. 436.

APPENDIX

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ALBERT DICKERSON, DEFENDANT

U. S. Court of Appeals, 7th Circuit, No. 17349, 7/28/69.

Thomas A. Foran, United States Attorney, Chicago, Ill., Johnnie M. Walters, Joseph M. Howard, Richard B. Buhrman, Department of Justice, Washington, D. C. 20530, for plaintiff-appellant. William A. Barnett, 135 S. LaSalle St., Chicago, Ill., for defendant.

Before FAIRCHILD and CUMMINGS, Circuit Judges, and GRANT, District Judge.[1]

CUMMINGS, Circuit Judge: In April 1967, defendant was indicted for failure to file income tax returns for 1960, 1961 and 1962 in violation of Section 7203 of the Internal Revenue Code (26 U. S. C. § 7203). In March 1968, claiming a violation of his rights under the Fourth and Fifth Amendments, he filed a motion for the return of certain property and for the suppression of evidence. The motion was based on the admitted failure of the Internal Revenue Agents to warn him of his constitutional rights during five interviews with him.

[*IRS Investigation*]

Based on an affidavit of defendant and the testimony of Revenue Agent Donald Petrovic at the hearing on the motion to suppress, the district court found that, while "auditing" a scavenger company Petrovic found an entry on its books reflecting a large payment to defendant but that the company had filed no related information re-

[1] Chief Judge Grant is sitting by designation from the United States District Court for the Northern District of Indiana.

turn. Consequently in July 1964, Petrovic "audited" defendant, who admitted that he had failed to file certain income tax returns. Late that year Petrovic referred the case to his superiors to determine if the case warranted criminal investigation. In January 1965, the case was assigned to Special Agent Cornue, an investigator for the Intelligence Division of the Internal Revenue Service. The jurisdiction of the Intelligence Division is limited to criminal investigations. Petrovic was assigned to assist Cornue. Their joint investigation began on March 24, 1965, with a visit to defendant at his place of business. On that occasion, Cornue identified himself as a Special Agent but did not advise defendant that the investigation had become criminal, nor was defendant advised of any of his constitutional rights. Petrovic and Cornue again saw defendant on May 7, 1965, and Cornue alone interviewed defendant on March 29, April 1, April 6[2] and June 24, 1965.

Cornue's affidavit in support of the Government's motion for reconsideration showed that at the June 24, 1965 interview, defendant said he had engaged a lawyer and had given him "everything he could find that had anything to do with his income tax." Defendant's lawyer was present when defendant was next interviewed by both agents on November 10, 1965.

The Government's brief concedes that the indictment resulted from the information gathered at five of the earlier interviews. These are the occasions when, according to his affidavit, defendant answered the agents' questions and furnished them with documentary and oral information. This affidavit claims that the records surrendered to the agents consisted of personal records of income and expenses, including the names of customers and names of persons to whom commission payments were made.

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[2] The April 6 interview is identified in Special Agent Cornue's affidavit of November 5, 1968.

[*District Court's Decision*]

Relying on *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436, the district court held that "at and from the time a criminal investigation is launched against a taxpayer," IRS Agents are required to inform him of his right to remain silent, that anything he says may be used against him, and that he has a right to counsel. The *Escobedo* opinion was handed down before the civil or criminal investigations of defendant's tax returns had begun, and *Miranda* was handed down more than a year after the crucial interviews. However, the district court noted than *Miranda* is applicable to all cases filed (as here) after its promulgation.

Applying the *Miranda* rationale, the trial court held that the evidence obtained from defendant during the criminal investigation and before his retention of counsel would have to be suppressed, along with any evidence obtained as a result of information gained during that phase of the criminal investigation. 291 F. Supp. 633. The Government appealed under Title VIII of the Omnibus Crime Control Act (18 U. S. C. § 3731).[3] We affirm.

[*Miranda Examined*]

Both parties seek to find support for their positions in the *Miranda* decision, the Government stressing the physi-

[3] Taxpayer asserts that 18 U.S.C. § 3731 violates his rights to due process and a speedy trial insofar as it permits the Government to appeal from an adverse ruling on a motion to suppress. This point was not pressed at oral argument, and in light of our disposition of the principal issue presented in the taxpayer's favor, does not merit extended treatment here. Far from suggesting a lack of legislative power to authorize such interlocutory appeals, *Carroll* v. *United States*, 354 U.S. 394, 407, relied on by the taxpayer here, decided only that such appeals were not authorized by statutes then in forces. The Court noted, "If there is serious need for appeals by the Government from suppression orders * * * it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appelate jurisdiction in criminal cases."

cal custody in which the interrogations involved in *Miranda* and its companion cases took place and defendant laying heavy emphasis on the policies underlying the adoption of the *Miranda* warnings. We recognize the factual limitations of the precise holding in *Miranda*. On the other hand, we cannot accept an interpretation of that decision which would restrict the implementation of the Court's overriding concern with the opportunity for intelligent exercise of constitutional rights to interrogations conducted in police stations. Indeed, the opinion makes clear that the privilege against self-incrimination is imperiled when one "deprived of his freedom of action in any significant way" (384 U. S. at pp. 444, 445, 467, 477, 478) is subjected to interrogation without being apprised of his right to remain silent, the consequences of a decision to forgo that right, and the right to the presence of an attorney, retained or appointed, to assist in making that decision. And the Court has recently confirmed that these warnings are required prior to interrogating a suspect in his own bedroom if it appears he is not free to go where he pleases. *Orozco* v. *Texas*, 394 U. S. 324.[4]

Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in *Miranda*. See 384 U. S. at pp. 475-476. The Government's brief appears to recognize that ignorant compliance with the requests of the authorities can no longer be equated with a valid waiver of constitutional rights.[5] We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those consti-

[4] The opinion does not appear to depend upon a formal arrest, and no mention is made of whether Orozco in fact knew that he was not free to leave.

[5] *Powers* v. *United States*, 223 U.S. 303, and *Wilson* v. *United States*, 162 U.S. 613, are cited as "prior law."

tutional rights designed to protect him under precisely such circumstances. No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights, or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. See Hewitt, "The Constitutional Rights of the Taxpayer in a Fraud Investigation," 44 Taxes 660, 668 (1966).

In this Circuit, the district courts recently considering the question have uniformly held that some form of warnings must be given by IRS agents once an investigation has shifted to one criminal in nature, despite the absence of physical custody.[6] The Government has drawn to our attention numerous cases in this and other Courts of Appeals which are said to establish that *Miranda* has no application to criminal tax investigations. Our examination of those and other cases decided after *Miranda* reveals that in almost every instance some warnings were in fact given,[7] an attorney was present during the crucial

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[6] *United States* v. *Turzynski* [67-2 USTC ¶ 9489], 268 F. Supp. 847 (N. D. Ill. 1967); *United States* v. *Dickerson* [69-1 USTC ¶ 9174], 291 F. Supp. 633 (N. D. Ill. 1968); *United States* v. *Habig* [69-2 USTC ¶ 9557], No. IP 66-CR-138 (S. D. Ind. Nov. 19, 1968) (unreported); *United States* v. *Lackey*, Lafayette Criminal No. 177 (N. D. Ind. Oct. 2, 1968) (unreported); *United States* v. *Townsend*, No. IP 65-CR-115 (S. D. Ind. Sept. 14, 1966) (unreported). To the same effect, see *Goodman* v. *United States* [68-1 USTC ¶ 9385], 285 F. Supp. 245 (C. D. Cal. 1968); *United States* v. *Wainwright* [68-1 USTC ¶ 9311], 284 F. Supp. 129 (D. Colo. 1968); *United States* v. *Gower* [67-2 USTC ¶ 15,760], 271 F. Supp. 655, 660 (M. D. Pa. 1967); *United States* v. *Kingry* [67-1 USTC ¶ 9262], (N. D. Fla. 1967); *United States* v. *Schoenburg* [67-1 USTC ¶ 9393], (D. Ariz. 1966). See also *United States* v. *Guerrina* [53-1 USTC ¶ 9369], 112 F. Supp. 126 (E. D. Pa. 1953), modified [55-1 USTC ¶ 9143] 126 F. Supp. 609 (E. D. Pa. 1955).

[7] *E.g.*, *United States* v. *Mansfield* [67-1 USTC ¶ 9586], 381 F. 2d 961 (7th Cir. 1967), certiorari denied, 389 U.S. 1015; *Muse* v.

interviews,[8] or the absence of physical custody was considered determinative.[9] We recognize, of course, that language appears in many of these cases which is inconsistent with the conclusion which we reach today. We therefore turn our attention to the asserted distinctions which are said to render the *Miranda* concern that any incriminating statements elicited from a suspect should be "truly the product of free choice" (384 U. S. at p. 457) inapplicable to criminal investigations by the IRS.

A line of cases originating between the *Escobedo* and *Miranda* decisions, notably *Kohatsu* v. *United States*, 351 F. 2d 898 (9th Cir. 1965), reasons that because the IRS agents cannot determine whether a crime has in fact been committed until their investigation is complete, the adversary process has not sufficiently "focused" on the suspect as to require that warnings be given. But as Judge Will observed in his persuasive opinion in *United States* v. *Turzynski*, [67-2 USTC ¶ 9489] 268 F. Supp. 847, 852-853 (N. D. Ill. 1967):

> "This distinction between a criminal tax investigation where the taxpayer is suspected of a fraud not yet fully identified and a criminal investigation

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United States [69-1 USTC ¶ 9133], 405 F. 2d 40 (8th Cir. 1968); *United States* v. *Mackiewicz* [68-2 USTC ¶ 9461], 401 F. 2d 219 (2d Cir. 1968); *United States* v. *Squeri* [68-2 USTC ¶ 9493], 398 F. 2d 785 (2d Cir. 1968); *Spinney* v. *United States* [67-2 USTC ¶ 9738], 385 F. 2d 908 (1st Cir. 1967), certiorari denied, 390 U.S. 921; *United States* v. *Maius* [67-2 USTC ¶ 9521], 378 F. 2d 716 (6th Cir. 1967), certiorari denied, 389 U.S. 905; *Morgan* v. *United States* [67-1 USTC ¶ 9449], 377 F. 2d 507 (1st Cir. 1967).

[8] *E.g.*, *United States* v. *Mancuso* [67-2 USTC ¶ 9487], 378 F. 2d 612 (4th Cir. 1967), certiorari denied, 390 U.S. 955; *United States* v. *Fidanzi*, No. 16984 (7th Cir. June 23, 1969) [69-2 USTC ¶9487].

[9] *E.g.*, *Hensley* v. *United States* [69-1 USTC ¶ 9146], 406 F. 2d 481 (10th Cir. 1968); *Cohen* v. *United States* [69-1 USTC ¶ 9132], 405 F. 2d 34 (8th Cir. 1968), certiorari denied, 394 U.S. 943; *Morgan* v. *United States*, *supra*, note 7; *Spahr* v. *United States* [69-1 USTC ¶ 9315], 1969 CCH Tax Cas. ¶ 9316 (5th Cir. April 2, 1969).

> where a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has begun, *i.e.*, when the investigatory machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. What matter if the culprit is known before the crime or the crime before the culprit. In either case the investigator is attempting to develop evidence for the purpose of criminal prosecution and conviction."

Nor can the *Kohatsu* rationale, once accepted, be limited to investigations in the tax area. Such a rationale would apply to most white collar crimes and any other crimes where the identity of the suspected lawbreaker is not in issue. This category might include unauthorized practice of law, attempted bribery, impersonation of a federal officer, refusal to report for induction, violations of Section 5 of the Securities Act, the Landrum-Griffin Act, and the Sherman Act, among others. No principled distinction has been suggested which would carve out such exceptions to the policies expressed in *Miranda*.

Such a distinction cannot survive the Supreme Court's decision in *Mathis* v. *United States* [68-1 USTC ¶ 9357], 391 U. S. 1, where the Government sought to escape the application of *Miranda* to an interrogation of a taxpayer incarcerated for an unrelated offense because the questions were asked as a part of a routine tax investigation where criminal proceedings might never be brought. Noting that "tax investigations frequently lead to criminal prosecutions, just as the one here did," (391 U. S. at p. 4), the Court rejected any such distinction as "too minor and shadowy" to warrant a departure from *Miranda*.

[*Warning Must Be Given*]

The Government argues that the absence of custodial detention and other indicia of criminal prosecution in

the tax fraud investigation negatives any possibility of coercion or overbearing of the taxpayer's will. But it is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe. As the district judge observed (291 F. Supp. at pp. 636-637):

> "It would seem to us that the average citizen, faced with repeated questioning by two government agents is in an ominous situation to say the least. The Government suggests that the defendant was in no way physically restrained but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the federal authorities."

Only the rare taxpayer would be likely to know that he could refuse to produce his records to IRS agents. Nor would he be likely to make any distinction between revenue agents and special agents without some explanation as to the different functions of these two offices. As noted in Lipton, "Constitutional Rights in Criminal Tax Investigations," 45 F. R. D. 323, 336 (1968), the pressures on the uninformed taxpayer to cooperate with the agents are considerable:

> "First there is always the fear of incurring a civil tax liability that hopefully might be avoided by cooperation. Also, a taxpayer may conclude that lack of cooperation will result in unwanted publicity about a tax liability. *The average citizen, moreover, believes the government prosecutes only the recalcitrant, uncooperative individual who is unwilling to pay what he owes.* Who would believe the ironic truth that the cooperative taxpayer fares much

worse than the individual who relies upon his constitutional rights!" (Emphasis supplied.)

Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings. *Cf. Gouled* v. *United States*, 255 U. S. 298, 305-306; *United States* v. *Guerrina* [53-1 USTC ¶ 9369], 112 F. Supp. 126 (E. D. Pa. 1953), modified, [55-1 USTC ¶ 9143] 126 F. Supp. 609 (E. D. Pa. 1955); Comment, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tul. L. Rev. 862, 864-865 (1968).

Under such circumstances it is imperative that the taxpayer be advised that he is the subject of a criminal investigation and that he need not answer questions put to him by the agents. "For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise." *Miranda* v. *Arizona*, 364 U. S. 436, 468. The rationale behind the warning as to the consequences of waiving the right to remain silent, as expressed in *Miranda*, is particularly apt to the present situation, for "this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." 384 U. S. at p. 469. As in *Miranda*, we deem advice as to the right to have counsel present a valuable adjunct to the protections of the Fifth Amendment prescribed above.

Our conclusion is that *Miranda* warnings must be given to the taxpayer by either the revenue agent [10] or the spe-

[10] In *Mathis*, the Supreme Court required a revenue agent to give the warnings upon first questioning the taxpayer, even though no "fullfledged criminal investigation" was begun until eight days later. See 391 U.S. at p. 4. There the suspect was in custody for an unrelated offense. Mindful of the disruptive effect which a blanket

cial agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division.[11] We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind.[12] Absent such warnings, the motion to suppress in the present case was properly granted.

In recognition of the fact that this holding represents a departure from the present state of the law,[13] and a

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requirement of warnings might have if applied to all civil investigations, we have determined that the inception of the first contact with the taxpayer after referral to the Intelligence Division is the appropriate point at which to require the *Miranda*-type warnings outlined above.

[11] See Andrews, "The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The 'Critical Stage,'" 53 Iowa L. Rev. 1074, 1085-1087, 1111, 1116-1117 (1968); Comment, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tul. L. Rev. 862, 870 (1968).

[12] Thus there is no conflict in this respect with *United States* v. *Spomar* [65-1 USTC ¶ 9141], 339 F. 2d 941 (7th Cir. 1964), certiorari denied, 380 U.S. 75, on which the Government has so heavily relied. Moreover, that was a pre-*Miranda* case, and the defendant did not contend that revenue agents had the duty to advise him of his right to refuse to furnish the requested information (339 F. 2d at p. 942).

[13] We are informed that since May 1967 the Internal Revenue Service has required special agents to give a modification of the *Miranda* warnings to taxpayers at the first interview. See *United States* v. *Turzynski* [67-2 USTC ¶ 9489], 268 F. Supp. 847, 854 (N. D. Ill. 1967). The November 1967 instructions to special agents are reproduced in *United States* v. *Wainwright* [68-1 USTC ¶ 9311], 284 F. Supp. 129, 133 (D. Colo. 1968). These instructions were somewhat amplified in November 1968 according to *IRS News Release* IR-949 (1969 CCH Fed. Tax Rptr., ¶ 6946).

This recent administrative practice, characterized as an act of grace at oral argument, diminishes the impact of our holding today, but does not, in our view, obviate the responsibility of this Court to render judgment in accordance with our understanding of the intendment of *Miranda*.

new implementation of the *Miranda* policy, and in accordance with the criteria set forth in *Stovall* v. *Denno*, 388 U. S. 293, 297, we have determined that this decision should be given a prospective application. In *Johnson* v. *New Jersey*, 384 U. S. 719, *Miranda* was applied only to cases in which the trial began after the date of the *Miranda* decision. However, as the Court noted in a more recent case involving a special aspect of the retroactivity of *Miranda*, the approach of the Court to prospective decision-making has undergone some modification since *Johnson* was decided. See *Jenkins* v. *Delaware*, ... U. S. ....., 37 U. S. L. W. 4458 (June 2, 1969). In conformity with the more recent practice as developed in *Stovall*, *supra*, and *Desist* v. *United States*, 394 U. S. 244, we have determined to apply our holding to interrogations taking place after the date of this decision. See Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N. Y. U. L. Rev. 631, 646 (1967); Fairchild, "Limitation of New Judge-Made Law to Prospective Effect Only: 'Prospective Overruling' or Sunbursting," 51 Marq. L. Rev. 255, 265 (1968). The defendant in the companion *Habig* case, which was argued together with the instant case, will also be entitled to the benefit of today's holding. However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today. See *Desist* v. *United States*, 394 U. S. 244, 259 (HARLAN J., dissenting).

AFFIRMED

[Dissenting Opinion]

FAIRCHILD, Circuit Judge (dissenting): The *Miranda*[1] equation is that official questioning of one who is in custody or deprived of his freedom of action in any significant way equals compulsion to answer unless the *Miranda* warnings or other effective means are used to insure absence of compulsion. Underlying its pronouncement were years of judicial experience with the frustrations

[1] *Miranda* v. *Arizona* (1966), 384 U.S. 436.

of case by case decision as to the voluntariness of statements given by persons in police custody (most often state or local). *Mathis*[2] and *Orozco*[3] decide that the equation is valid in the particular situations considered, but do not suggest that compulsion to answer is to be presumed in situations where the person is not in custody or deprived of freedom of action.

It is compulsion to answer which offends against the fifth amendment provision that no person shall be compelled in any criminal case to be a witness against himself. *Miranda* decided that one in custody or deprived of freedom of action and questioned by an officer is subjected to such pressure to answer that the warnings are required in every instance.

This court is now deciding, essentially, that the official character of the revenue agent makes compulsion to answer his questions so probable that the warnings are required to prevent it. Yet the court distinguishes between the revenue agent before IRS has internally decided to consider prosecution and the revenue agent or special agent after such decision.

If a violation of the fifth amendment is really involved, I assume there are types of state agents as well as other types of federal agents who will be reached by this decision.

I think that candor on the part of a special agent who is seeking incriminating evidence is good governmental policy, and, as noted in Judge Cummings' able opinion, the IRS has decided as a matter of policy that warnings should be given. It may well lie within federal judicial power to decide to exclude evidence obtained without such candor. But I do not believe the fifth amendment requires it.

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[2] *Mathis* v. *United States* [68-1 USTC ¶ 9357] (1968), 391 U.S. 1.

[3] *Orozco* v. *Texas* (1969), 394 U.S. 324.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ARNOLD F. HABIG and JEROME M. SCHROERING, DEFENDANTS-APPELLEES

U. S. Court of Appeals, 7th Circuit, No. 17409, 7/28/69.

K. Edwin Applegate, United States Attorney, Indianapolis, Ind., Johnnie M. Walters, Joseph M. Howard, Department of Justice, Washington, D. C. 20530, for appellant. Fred P. Bamberger, 708 Hulman Bldg., Evansville, Ind., John W. Houghton, 1313 Merchants Bank Bldg., Indianapolis, Ind., for appellee.

Before FAIRCHILD and CUMMINGS, Circuit Judges, and GRANT, District Judge.[1]

CUMMINGS, Circuit Judge: This case arises on the Government's appeal under 18 U. S. C. § 3731 from an order suppressing certain evidence. In August 1966, defendants were indicted for attempting to evade the income taxes of four corporations and for aiding and assisting in the preparation of a fifth corporation's[2] false income tax return, in violation of Sections 7201 and 7206 (2) of the Internal Revenue Code. Two years after the filing of the indictment, the defendants filed a motion to suppress the records of the five corporations that "were photocopied by agents of the Internal Revenue Service during the investigation by them of possible criminal violations of federal income tax laws by the defendants," and seeking the return of the photocopies. The ground

[1] Chief Judge Grant is sitting by designation from the United States District Court for the Northern District of Indiana.

[2] The five corporations known as the Jasper Group, were the W. W. Kimball Company, Evansville Veneer & Lumber Co., Inc., The Jasper Corporation, Borden Cabinet Corporation and Lafayette Manufacturing Co., Inc.

for the motion was that the items were "illegally seized without search warrant, summons or subpoena being served upon or against either defendant." The supporting affidavits of each defendant asserted that:

> "approximately two years prior to the [August 12, 1966] date of the return of the indictments in this cause, agents of the Internal Revenue Service were seeking to obtain evidence for the purpose of criminally prosecuting him, but at no time was he ever informed or advised by any such agent that he was being investigated for criminal violations of the federal tax laws."

The Government denied the first of these allegations and also filed an affidavit of Revenue Agent Charles E. Lawrence. This affidavit disclosed that Lawrence was assigned to investigate the income tax returns of these five corporations in the early part of 1963. The affidavit also disclosed that the case was "subsequently" referred (by Lawrence) to the Intelligence Division of the Internal Revenue Service and that Special Agent Russell C. Hicks was assigned to the case. The date of his assignment was not revealed. The first meeting between Messrs. Hicks, Lawrence, and defendant Schroering (the comptroller of the corporations) occurred on September 21, 1964, and Schroering was then advised that Hicks was a special agent "assigned to determine if there was any criminal tax fraud in connection with the returns being examined." A representative of the accounting firm for the corporations was also present at the meeting. The examination and photocopying of the corporate records were always pursuant to "the consent of a corporate officer or representative."

[*District Court's Findings*]

After the filing of these affidavits, the district court held an evidentiary hearing at which defendant Habig, the chairman of the boards of the five corporations, and

Revenue Agent Lawrence were witnesses. At the hearing and again at oral argument before this Court, the Government conceded that the defendants had standing to question the copying of the corporate records. The district court found in substance as follows:

> Internal Revenue Service agents obtained certain records of the five corporations containing evidence material to the prosecution of the indictment against the defendants. These records were obtained without a search warrant, summons or subpoena. In March 1963, Revenue Agent Lawrence was assigned to examine the income tax returns of the five corporations "for civil liability." Through the public accounting firm representing the corporations, he was referred to defendant Schroering with respect to his dealings with the corporations.
>
> In late 1963, Lawrence referred the matter to the Intelligence Division of the Internal Revenue Service because he suspected criminal violations. Special Agent Hicks was subsequently assigned to make a criminal investigation of the returns, but the date of his assignment is unknown.[3] Lawrence did not advise the corporations or their accounting firm of his referral to the Intelligence Division. Hicks and Lawrence called on defendant Schroering and a representative of the accounting firm in late September 1964. At this meeting, the corporations first learned that their returns were being criminally investigated. The district court inferred that Lawrence fulfilled his duty to disclose to Hicks the evidence and leads acquired between late 1963 and September 1964. The court also inferred that the corporations' and defendants' consent to examine and copy corporate records after September 1964 would not have

[3] A second affidavit of Revenue Agent Lawrence was filed below in support of the Government's unsuccessful motion for rehearing. It shows that Lawrence referred the matter to the Intelligence Division on February 11, 1964, and that the case as assigned to Special Agent Hicks on March 27, 1964. This was confirmed by the affidavit of the Indianapolis chief of the Intelligence Division.

been given if the agents had "disclosed their conduct from late 1963 to September 1964."

On these findings, the trial court concluded that the records and leads were obtained while the Government was conducting a criminal investigation "during the period from late 1963 to September of 1964 but while the defendants and said corporations believed plaintiff was conducting a civil tax investigation due to the agent's [apparently Revenue Agent Lawrence] representations and his failure to advise them otherwise." The court further found that "defendants and the said corporations never consented to the search for the evidence for criminal investigation purposes during the period from late 1963 to September 1964." Accordingly, the court suppressed the photocopies of the corporate documents discovered by the Government during the one year period preceding the September 1964 meeting between Revenue Agent Lawrence, Special Agent Hicks, defendant Schroering, and the representative of the corporations' accounting firm. Also suppressed was all evidence obtained as the fruits of the investigation carried on during that period.

[*Nature of Issue in Dispute*]

The briefs of the respective parties before this Court evidence a fundamental dispute as to the nature of the question presented by this case. The Government has elected to treat this case as a companion to *United States* v. *Dickerson*, No. 17349, which was argued here on the same day. As in *Dickerson*, the Government argues that the suppressed evidence was not illegally obtained even if the defendants believed that the investigation was purely civil and even if the IRS agents did not advise defendant that the investigation had become criminal. Defendants strongly and repeatedly object to any such characterization of this case, arguing that the only question presented is whether the district court erred in holding that the Government had failed to sustain its burden

of proving that the evidence in question was lawfully procured without the issuance of any search warrant or subpoena. Throughout the proceedings below counsel for defendants stressed the absence of "informed consent" as the fatal weakness in the Government's case.

A reading of the exhibits and the testimony received below demonstrates that the parties are not in disagreement that Agent Lawrence was in fact allowed to inspect various corporate records. The essential point of dispute, and the issue on which the district court's findings of fact turn, is whether such consent was vitiated when the purpose of the investigation shifted from civil to criminal. Viewed in this light, we are of the opinion that the issue presented for decision in the present case does depend upon the obligation of the IRS agents to inform the defendants of the purpose of their investigation and of the rights which attach to one under criminal investigation. Accordingly, this case will be considered in the light of the principles announced this day in *United States* v. *Dickerson*, [69-2 USTC ¶ 9556] No. 17349.

In its principal brief, the Government admits that the suppression order was proper if *United States* v. *Turzynski* [67-2 USTC ¶ 9489], 268 F. Supp. 847 (N. D. Ill. 1967) was correctly decided. In *Dickerson*, we have approved the rationale of the *Turzynski* case and have held that the advice of constitutional rights prescribed in *Miranda* v. *Arizona*, 384 U. S. 436, must be given to taxpayers suspected of criminal violations "by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division" (— F. 2d at p. —).

[*Case Remanded*]

According to one of the supplemental affidavits filed by the Government (see note 3 *supra*), all the records covered by this suppression order were examined by Lawrence prior to his referral of the case to the Intelligence

Division, and no leads from that material were obtained by him between the referral and the aforesaid September 1964 meeting. If the Internal Revenue Service obtained all this evidence and the leads prior to the first contact with the defendants after the February 19, 1964, reference to the Intelligence Division or, if any evidence obtained illegally thereafter was merely duplicative, the suppression order may not stand. Since the above facts were presented by the Government by way of affidavits in support of a motion for rehearing which was denied by the district judge despite his apprehension about a possible miscarriage of justice, a determination of the precise order of events is impossible on the present state of the record. Therefore, without implying any criticism of the district court's disposition of the Government's rehearing motion, we have determined that the interests of justice require a remand for a further hearing in order to develop the facts necessary to the application of the standards subsequently announced in *Dickerson*.[4]

The order is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Concurring and Dissenting Opinion

FAIRCHILD, Circuit Judge (concurring in part, dissenting in part).

I agree that the suppression order should be vacated, but disagree with the direction to apply the *Dickerson* standards.

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[4] We have no occasion in this case to consider the possible abuse of our holding in *Dickerson* by unreasonably delaying the initial reference to the Intelligence Division in order to avoid the effect of the warnings which are required after such a reference is made. Defendants suggest that the findings below support an inference that Revenue Agent Lawrence continued his investigations in aid of the Special Agent, who remained unknown to defendants until the September 1964 meeting. Such an inference depends on the actual chronology of events, which may be affected by the findings to be made on remand.